

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP745

Cir. Ct. No. 2012CV6952

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

JOSEPH M. CEFALU,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION, AVENUE, INC. AND
WISCONSIN UNINSURED EMPLOYER FUND C/O ASU RISK GROUP,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
DOMINIC S. AMATO, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. Joseph M. Cefalu appeals from an order affirming the Labor and Industry Review Commission's (LIRC) determination that Cefalu was not entitled to permanent total disability benefits. Cefalu argues that LIRC

erroneously exercised its discretion in refusing to admit a prescription drug package insert suggesting that the medication could lead to perforated ulcers. Cefalu also argues that LIRC relied upon physician reports that were factually inaccurate. We affirm.¹

BACKGROUND

¶2 Cefalu worked as a carpenter for Avenue, Inc. On June 6, 2002, while carrying a pre-fabricated wall with co-workers, Cefalu slipped on muddy ground. Cefalu fell, injuring his lower back. Cefalu estimated that the wall weighed approximately 600 pounds. On June 10, 2002, Cefalu visited Dr. Eugene Skrzypek, who prescribed a four-pack of “Medrol 4”—a prescription steroid—and Tylenol. Dr. Skrzypek excused Cefalu from work. Cefalu received temporary total disability for the dates of June 6, 2002 through June 13, 2002.

¶3 On June 14, 2002, Cefalu visited Dr. Skrzypek for a follow-up appointment. Dr. Skrzypek reported that Cefalu’s back pain had significantly decreased and that Cefalu could return to work. However, the following day, on June 15, 2002, Cefalu went to the emergency room for severe abdominal pain. The treating physician noted that Cefalu was taking methylprednisolone, a steroid medication used in Medrol. A CT scan of Cefalu’s abdomen showed a perforated duodenum. The emergency room physician diagnosed Cefalu with a peritoneal ulcer, duodenal; peritonitis; and pneumoperitoneum. Cefalu was admitted to the hospital for surgery.

¹ LIRC submitted a motion to this court requesting that we order sanctions against Cefalu’s counsel due to multiple appellate rule violations committed in Cefalu’s briefs and appendix. Although we exercise our discretion in declining to impose sanctions, we strongly advise Cefalu’s counsel to give appropriate attention to the rules of appellate practice and procedure, particularly the rules pertaining to record references in an appendix and required appendix materials, should he prepare appeals in the future.

¶4 Dr. Nicholas Armstrong was Cefalu's treating surgeon. Dr. Armstrong noted the indications for surgery as follows:

The patient is a 42-year-old gentleman with a history of persistent back pain that has been treated most recently with Methylprednisolone. As this persisted he has developed acute abdominal pain.... He now presents for exploratory laparotomy for suspected perforated duodenal ulcer.

¶5 After surgery, Cefalu was diagnosed with a perforated duodenal ulcer. Because of complications following the surgery, Cefalu ultimately underwent multiple abdominal surgeries.

¶6 Cefalu applied for permanent total disability, stating that he was completely disabled as a result of his surgeries, and that his work-related injury caused the perforated ulcer and the resulting surgeries. Cefalu relied on reports from multiple physicians stating that Cefalu's ulcer was caused by Medrol.

¶7 On June 28, 2011, a hearing was held before an Administrative Law Judge (ALJ) for the Department of Workforce Development. The ALJ received numerous medical reports into evidence, but refused to accept "Exhibit P," an insert for the prescription drug Medrol. The insert, as relevant, provided:

Steroids should be used with caution in nonspecific ulcerative colitis. If there is a probability of impending perforation, abscess, or other pyogenic infection ... active or latent peptic ulcer....

The insert also noted that known adverse reactions include "peptic ulcer with possible perforation and hemorrhage." The ALJ excluded the insert, stating that it "involve[s] hearsay and issues of authenticity," and because "the copy right [*sic*] on the face of [the insert] is 2010 versus ... 2002 at which time [Cefalu] allegedly received and took [Medrol]." There was no evidence as to how many doses of

Medrol Cefalu took in 2002, nor was there evidence that the dosage to which the insert relates was the same dosage Cefalu consumed. The ALJ did, however, accept documents from several medical experts, including Dr. Armstrong, Dr. John Brusky, and Dr. Kristen Reynolds, all of whom submitted reports on behalf of Cefalu; and Drs. Randal Wojciehoski and Jerome Hanson, who submitted documents for Avenue, Inc.'s insurance carrier.

¶8 Drs. Armstrong and Reynolds concluded that Cefalu was permanently disabled as a result of his work injury. Both doctors opined that Cefalu's Medrol intake led to a perforated duodenal ulcer, which in turn led to multiple surgeries, and ultimately led to chronic abdominal pain and back pain. A practitioner's report from Dr. Brusky stated that while he was unsure of what caused Cefalu's ulcer, he assumed that the ulcer and the subsequent surgeries started Cefalu's "pain syndrome." Dr. Brusky marked "yes" to the question on the practitioner's report asking, "In your opinion, is it probable that the [accidental event or work exposure] directly caused the disability?" but noted that the reason for Cefalu's "persistent pain is unknown." An office note from Dr. Brusky dated September 5, 2002, also noted that Cefalu had a "history of a stomach ulcer about 20 years ago." Drs. Armstrong, Reynolds and Brusky all treated Cefalu directly.

¶9 Drs. Wojciehoski and Hanson both obtained Cefalu's medical history. Both doctors concluded that Medrol was not the cause of Cefalu's perforated duodenal ulcer, and therefore his disability was not work-related. Dr. Wojciehoski obtained Cefalu's medical history dating back to 1991 and evaluated Cefalu personally. Dr. Wojciehoski's practitioner's report indicated multiple conditions present in Cefalu's medical history, including "[a]cute and chronic peptic ulcer disease" and "[p]ositive helicobacter pylori." Dr. Wojciehoski opined:

[A]ll of the above diagnoses are personal health conditions and pre-existing. It is my opinion to a reasonable degree of medical probability that if the history obtained is true, Mr. Cefalu did sustain a musculoskeletal low back strain on June 6, 2002.... [H]is current subjective complaints of back pain are secondary to degenerative changes and not related to the reported work injury of June 6, 2002.

It is also my opinion to a reasonable degree of medical probability that a four-day course of corticosteroids [Medrol] did not lead to the perforation of the peptic ulcer, as Mr. Cefalu has a longstanding history predating his injury by at least ten years. As noted in 1992, there was clear evidence he suffered from peptic ulcer disease.

Ultimately, Dr. Wojciehoski opined that Cefalu did not sustain a permanent partial disability as a result of his work-related injury.

¶10 Dr. Hanson's medical report also significantly relied on Cefalu's medical history, though Dr. Hanson did not personally examine Cefalu. Dr. Hanson, a gastroenterology specialist, diagnosed Cefalu with a "perforated duodenal ulcer due to nonsteroidal anti-inflammatory drug use and *Helicobacter pylori* infection." Dr. Hanson stated that the combination of nonsteroidal anti-inflammatory drugs and the *Helicobacter pylori* infection account for "90 percent or more of the cases of ulcers." Dr. Hanson also noted that Cefalu had a history of duodenal ulcers, preceding his perforation, and concluded that it is widely accepted in the medical field that "corticosteroids do not cause ulcer disease." He also stated that in Cefalu's case, "the brief course of corticosteroids begun only four days prior to his perforation would have been an unreasonable explanation for ulcer, given his long history of ulcer disease, epigastric complaints, nonsteroidal anti-inflammatory drug use, and *Helicobacter pylori* infection."

¶11 In addition to receiving multiple medical reports, the ALJ also heard from Cefalu himself, who testified at the hearing. When asked about whether he

took nonsteroidal anti-inflammatory drugs, specifically, whether Dr. Hanson's report that Cefalu "has documented use of oral analgesics and anti-inflammatory drugs" was accurate, Cefalu responded, "not that I remember, no."

¶12 In a written decision, the ALJ found Dr. Hanson's report most credible. He concluded that the reports of Drs. Armstrong and Reynolds were "antiseptic reports contain[ing] no true narrative explanation," but rather contained the "mysterious and unexplained conclusion ... that the Medrol Dose pack caused the perforated ulcer." The ALJ denied Cefalu's application for benefits.

¶13 Cefalu appealed to LIRC, arguing that: (1) Dr. Hanson's, and subsequently the ALJ's, assumption that Cefalu was taking nonsteroidal anti-inflammatory drugs and oral analgesics was not supported by substantial and credible evidence; (2) the ALJ erroneously refused to admit the Medrol package insert into evidence; and (3) there was no legitimate doubt that the perforated ulcer was caused by the Medrol.

¶14 LIRC affirmed the ALJ's decision. In its written decision, LIRC noted the "divergent opinions" of the multiple medical experts, addressed the opinions and reports of all of the relied upon medical experts, and ultimately concluded that Drs. Wojciehoski and Hanson "gave more fully explained and more credible reasonable opinions in this case." LIRC stated that it was "not persuaded that the evidence, or lack of evidence, regarding [Cefalu's] use of nonsteroidal anti-inflammatory medication undercuts the credibility of the opinions of Drs. Hanson and Wojciehoski." It also stated that Dr. Hanson's observation that Cefalu tested positive for *Helicobacter pylori* "undercuts the credibility of the opinions of the applicant's doctors who place the blame for the ulcers on a few days of Medrol medication use."

¶15 LIRC also addressed Cefalu’s complaint as to the Medrol prescription drug insert, stating that the ALJ correctly denied Cefalu’s request to include the insert and that any “persuasive force” of the document was rebutted by the medical evidence on the record.

¶16 Cefalu sought judicial review of LIRC’s decision and appealed to the Milwaukee County Circuit Court. Cefalu argued that the ALJ committed reversible error by refusing to admit the Medrol package insert into evidence, and that the medical opinions of Drs. Wojciehoski and Hanson were based on inaccurate facts. The circuit court rejected both arguments, finding:

It is apparent from LIRC’s decision that LIRC did, in fact, “consider” the precautions contained in the package insert, yet discredited the evidentiary effect of the insert in light of the opinions of Drs. Wojciehoski and Hanson. Therefore, admitting the package insert into evidence would not have altered LIRC’s final decision. Any error on admissibility grounds would be harmless.

....

Cefalu argues that Dr. Hanson’s opinion is based upon nonexistent “history” of nonsteroidal anti-inflammatory drugs dating back to the 1990’s. LIRC rejected this argument at the administrative level. LIRC noted that Cefalu testified that he could not remember taking nonsteroidal anti-inflammatory medications, and that the administrative law judge discredited Cefalu’s testimony. Ultimately, LIRC accepted the administrative law judge’s credibility determination. On appeal, this Court is unwilling to disturb findings of credibility.

¶17 This appeal follows.

DISCUSSION

¶18 On appeal Cefalu contends that the exclusion of the Medrol prescription drug insert was prejudicial error, and that the reports of Drs.

Wojciehoski and Hanson were based on false medical histories. We address both arguments.

I. Standard of Review.

¶19 In conducting our review, we review LIRC’s decision and not the decision of the circuit court. *See Madison Gas & Elec. v. LIRC*, 2011 WI App 110, ¶7, 336 Wis. 2d 197, 802 N.W.2d 502. We may set aside, or vacate, LIRC’s order only upon the following grounds: (1) LIRC acted without or in excess of its powers; (2) the award was procured by fraud; or (3) the findings of fact by LIRC do not support the order or award. WIS. STAT. § 102.23(1)(e) (2011-12).² “LIRC’s findings of fact will be upheld on appeal if they are supported by credible and substantial evidence in the record.” *North River Ins. Co. v. Manpower Temp. Servs.*, 212 Wis. 2d 63, 69, 568 N.W.2d 15 (Ct. App. 1997); *see also* WIS. STAT. § 102.23(6). Further, we are “not bound by the LIRC’s conclusions of law, but reasonable legal conclusions by the LIRC will be sustained even if an alternative view may be equally reasonable.” *See Eaton Corp. v. LIRC*, 122 Wis. 2d 704, 708, 364 N.W.2d 172 (Ct. App. 1985).

II. The Medrol Prescription Drug Insert.

¶20 Cefalu contends that the ALJ erroneously excluded the Medrol insert based upon a hearsay objection and a late-filing objection. Cefalu argues that the insert was admissible because it described the potential adverse reactions to the medication at issue in his case and was relevant as to the question of causation.

² All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶21 Admission of evidence is a matter of the administrative agency's discretion. *Board of Regents of the Univ. of Wis. Sys. v. State of Wis. Pers. Comm'n*, 2002 WI 79, ¶26, 254 Wis. 2d 148, 646 N.W.2d 759. Our review of a discretionary decision by an administrative agency is the same as that for a circuit court: the inquiry is whether the agency made a reasonable determination based on the relevant facts and the proper legal standard. *Verhaagh v. LIRC*, 204 Wis. 2d 154, 160, 554 N.W.2d 678 (Ct. App. 1996).

¶22 The ALJ excluded the Medrol insert on the basis of hearsay and lack of notice. LIRC upheld the ALJ's determination, noting that the persuasive effect of the insert was rebutted by credible evidence in the record. In so ruling, LIRC implicitly found the insert "not relevant." As LIRC noted, hearsay evidence may be admitted at administrative agency hearings, but whether to do so is at the discretion of the hearing examiner or the commission. *See Gehin v. Wisconsin Grp. Ins. Bd.*, 2005 WI 16, ¶57 n.65, 278 Wis. 2d 111, 692 N.W.2d 572. Here, we review LIRC's decision, not the ALJ's. Assuming the insert was admissible hearsay, LIRC concluded that the evidence lacked persuasive effect. We will uphold that discretionary decision if there is a reasonable basis for it. *See Board of Regents*, 254 Wis. 2d 148, ¶26. We conclude that there was a reasonable basis for the exclusion of the Medrol insert because Cefalu offered no foundation to establish the relevance of the insert.³ Thus, we affirm LIRC because we conclude the insert was not relevant and we do not further discuss whether it was admissible hearsay or whether Cefalu gave proper notice of his intent to offer the insert in

³ *See* WIS. STAT. § 904.01, defining "[r]elevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence ... more probable or less probable than it would be without the evidence."

evidence. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (We decide cases on the narrowest possible grounds.).

¶23 We conclude that the insert is not relevant in this case because the insert has a copyright date of 2010 and Cefalu was prescribed the medication in 2002. Cefalu has offered no evidence tending to show that the 2010 insert cautions pertained to the 2002 version of the medication. No expert witness identified the differences, or lack of differences, between the medication as it was formulated in 2002 and as it was formulated in 2010. No expert witness discussed the known potential side effects of Medrol in 2002 as opposed to in 2010. It is unknown whether the medication prescribed to Cefalu in 2002 is in fact the same medication described in the 2010 insert. As such, the 2010 insert does not tend to make it “more probable” that Cefalu’s consumption of an unknown quantity of Medrol in 2002 was a substantial factor causing his medical condition at the time of the hearing.

¶24 Additionally, LIRC concluded that the opinions of Drs. Wojciehoski and Hanson rebutted any information from the insert suggesting a causal connection between the medication and Cefalu’s perforated ulcer. Both LIRC and the ALJ relied heavily on the opinions of Drs. Wojciehoski and Hanson. Accordingly, we cannot conclude that the inclusion of the insert would have led to a different result. Cefalu was therefore not prejudiced by the exclusion of the Medrol insert.

III. There is credible evidence to support the commission’s findings.

¶25 Cefalu contends that LIRC erroneously relied on the reports of Drs. Wojciehoski and Hanson because those medical reports were based on false medical histories. Specifically, Cefalu argues that credible evidence in the record

does not support the doctors' conclusions that Cefalu had a history of taking nonsteroidal anti-inflammatory drugs and analgesics on a regular basis. We disagree.

¶26 LIRC, not the reviewing court, must determine the credibility and weight of the evidence. WIS. STAT. § 102.23(6); *see also Sterlingworth Condo. Ass'n v. DNR*, 205 Wis. 2d 710, 727, 556 N.W.2d 791 (Ct. App. 1996). We may not second guess the weight LIRC attributes to the evidence; rather, we may only pass on the reasonableness of LIRC's findings. *See Copland v. Wisconsin Dept. of Taxation*, 16 Wis. 2d 543, 555, 114 N.W.2d 858 (1962). The drawing of reasonable inferences from the evidence is also within the sole province of LIRC. *See Goranson v. DILHR*, 94 Wis. 2d 537, 556, 289 N.W.2d 270 (1980). We must not substitute our judgment for LIRC's application of the law to the facts if a rational basis exists in law for LIRC's interpretation, and it does not conflict with controlling precedent. *See Klusendorf Chevrolet-Buick, Inc. v. LIRC*, 110 Wis. 2d 328, 331-32, 328 N.W.2d 890 (Ct. App. 1982). Moreover, LIRC's factual findings must be upheld if they are supported by relevant, credible and probative evidence. *See Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54, 330 N.W.2d 169 (1983).

¶27 Cefalu's claim that the reports of Drs. Wojciehoski and Hanson were based on false medical histories is exaggerated. Neither doctor concluded that Cefalu *regularly* used nonsteroidal anti-inflammatory and analgesic medications. Rather, Dr. Hanson noted that Cefalu had a "documented use of oral analgesics and anti-inflammatory drugs from his orthopedic complaints which are varied dating back to the early 1990's." The record does indeed establish that Cefalu received prescription pain killers twice in 1993, and once in 1998. Dr. Hanson's report does not contradict the record. Moreover, LIRC noted that there was little

evidence in the record to refute the doctors' conclusions that Cefalu took nonsteroidal anti-inflammatory and oral analgesic medications. Cefalu testified that he did not recall whether he used the medications, leading the ALJ to find his testimony "evasive" and a credibility "red flag." LIRC was also not persuaded by Cefalu's testimony. Any lack of evidence of prior nonsteroidal anti-inflammatory and analgesic medication use does not necessarily conflict with the doctors' opinions—which LIRC found more credible—that Medrol did not cause Cefalu's perforated ulcer. Like the circuit court, we are unwilling to disturb LIRC's credibility determinations.

¶28 Furthermore, LIRC discussed the medical reports of Drs. Armstrong, Brusky, Reynolds, Wojciehoski and Hanson, and ultimately concluded that the reports of Drs. Wojciehoski and Hanson were the most credible. LIRC concluded that Drs. Wojciehoski and Hanson "gave more fully explained and more credible reasonable opinions in this case." The record also indicates that Cefalu had a history of ulcers and a *Helicobacter pylori* infection—both of which also support the doctors' conclusions that Medrol did not cause Cefalu's perforated ulcer.

¶29 For the forgoing reasons, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 2013AP745(C)

¶30 FINE, J. (*concurring*). I agree with the Majority that we have to affirm. I part company, however, with the Majority's holding that the package insert was not "relevant."

¶31 No prescription pharmaceutical product may be sold in the United States unless the Food and Drug Administration approves the product's new drug application and, among many other things, the package insert for the drug. *See* 21 U.S.C § 355, 21 CFR Part 201, 21 C.F.R. Part 314. Although the Food and Drug Administration relies in large measure on the data the drug company submits to it as part of the application process, the Administration has the final say-so on whether to approve the package insert. *See Wyeth v. Levine*, 555 U.S. 555, 570–571 (2009).

¶32 The Administrative Law Judge in this case erroneously refused to receive the package insert in the administrative hearing because he bought the argument that it was inadmissible "hearsay." It may be "hearsay" but the rules permit its receipt into evidence nevertheless.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(8) PUBLIC RECORDS AND REPORTS. ... (c) in civil cases ..., factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

WIS. STAT. RULE 908.03.

¶33 The Majority opines, however, that the 2010 package insert was “not relevant” because there was no tie between it and what the drug was in 2002 (and its possible side effects). But package inserts reflect data collected over time, and are not static snapshots as of the date printed; they are not, to borrow a concept from accounting, date-fixed benefit/side-effect balance sheets. “Relevance” only requires that there be a logical connection, not absolute irretrievable certainty. *See* WIS. STAT. RULE 904.01 (“‘Relevant evidence’ means evidence having *any tendency* to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”) (emphasis added).

¶34 As the Majority notes, though, the Labor and Industry Review Commission determined that even if the insert were received by the Administrative Law Judge, its decision would have been the same because, under the circumstances that the Majority fully sets out, the Commission gave it little weight. Under our standard of review, we are bound by that despite the Administrative Law Judge’s error of evidence law. Accordingly, I concur.

